IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION.

COMPANY PETITION No.764 of 2005.

M/s.Keppel Seghers Belgium NV ..Petitioner.

Mr. Kevic Setalwad i/b. D.H. Law Associates
for the Petitioner.

Ms.Anjali Chandurkar with Ranjit Sethi
i/b. P.D.S. Legal for Respondent.

CORAM:S.C.DHARMADHIKARI,J.

DATED: 4TH AUGUST,2006.

P.C.:-

1] By this Petition, the Petitioner seeks winding-up of the Respondent Company on the basis that the Petitioner and the Respondent had sometime In December, 2002 entered into an Agreement for delivery of a technology package. The delivery of technology package was for a effluent treatment plant at Maharashtra Distilleries Ltd. ("MDL"). The copy of the Agreement is annexed at Exh.A.

2] The case of the Petitioner is that they completed their part of the contract and delivered to the Company a technology package in terms of the Agreement.

3] It is their further case that the Respondent accepted this package without any demur and/or protest. No dispute was raised with regard to the execution of the works. Uoon completion, the Invoices mentioned in para 7 of the petition were raised and out of the claim of Rs.151,800 Euros, the Invoices which are at serial Nos. (i),(ii),(iii),(iv)and (vi) have been duly honoured and the amounts were paid. The outstanding amounts are with regard to the Invoices at serial No. (v) and (vii) to (x). Thus, the outstanding amount is 79,400 Euros. Mr. Setalwad has invited my attention to the annexures to the petition and more particularly, the E-mail message in which the Respondent has admitted the claim and has not raised any dispute with regard to either the terms and conditions of the Agreement at Annexure A nor pertaining to the breach of the parent Agreement.

4] In these circumstances, the presumption raised by law, has not been rebutted, prima facie, and therefore, petition should be

admitted.

5] On the other hand, Ms. Chandurkar appearing for the Respondent has invited my attention to the Affidavit-in-reply and apart from contending that the respondent is financially solvent and sound, she has invited my attention to the fact that there was a parent Agreement entered into the Petitioner and the Respondent Company entitled Technical know-how and Co-operation Agreement dated 9th October, 2001. In terms of this Agreement, the Respondent was to import the technology, after applying for the tenders, at competitive rates, floated by several entities which are referred to in the affidavit in reply. She submits that this agreement is the parent agreement. The agreement relied upon with regard to single project (MDL) cannot be divorced or segregated from the parent Agreement. It is her submission that in affidavit-in-reply a speific case is made out of breach of the terms and obligations of the parent Agreement. There is detailed correspondence on this issue. The respondents have quantified their losses under the tenders

referred to in the reply and in such circumstances and more particularly, when substantial sum has been paid, this is not a fit case for winding-up of the Respondents. These are essentially contractual disputes. A winding-up petition is not mode of recovery. She submits that once there is valid counter-claim and the Agreements are inter-linked then a bona fide dispute is raised to the claim. Several tribal issues arise for consideration and in such circumstances, the remedy of the Petitioner is elsewhere. She submits that Company Petition, therefore, be dismissed.

6] Mr. Setalwad in rejoinder has contended that so called counter claims are time barred. It is the petitioner who has Delinked to the Agreements and the correspondence annexed to the petition confirms this fact.

7] From a perusal of the Petition and the Annexures thereto it is apparent that the liability under the Invoices is not disputed by the Respondent. The E-mails are clear. However, the Respondent has in the

Affidavit-in-reply placed reliance upon the terms of the Parent Agreement and referred to correspondence in that behalf. Thus, it is by this Affidavit that the issues are sought to be interlinked. There is also a assertion that the Company has suffered losses on account of the breach of the terms of the Parent Agreement. In such circumstances, I expressed a prima facie view that if the Company wants to prove its counter claim, it must secure, atleast the Principal sum under the balance invoices referred above. More so, when it has made payment of the remaining invoices.

9] During the course of Arguments, I called upon Ms. Chandurkar to take instructions as to whether the Respondent Company is willing to secure the claim under the balance invoices at least to the extent of principal amount and upon such security being furnished within the time stipulated by this Court, Parties can be relegated to appropriate proceedings. After taking instructions from the Authorised representative of the Respondent present in the Court, she makes a

statement that the Respondent would furnish bank guarantee to the extent of principal amount under the Invoices namely Sr.No. (v) and (vii) to (ix) at para 7 of the Petition in Indian Rupees and upon furnishing of the bank guarantee parties be relegated to appropriate proceedings and all issues be kept open.

10] I see no prejudice to the petitioner by such course of action. More so, when the direction to furnish Bank Guarantee is issued without prejudice to the rights and contentions of both sides. The claim is under a contract, so also there being a defence raised of linking of the agreements both sides would get an opportunity to substantiate all pleas raised by them. In such circumstances, the following order would meet the ends of justice.

ORDER.

(A) Upon Respondent furnishing Bank Guarantee of a Nationalized Bank in favour of the Prothonotary and Senior Master of this Court in Indian Rupees to the extent of the

principal amount of the Invoices at Sr.No. (v) and (vii) to (x) referred in para 7 of the Petition within a period of eight weeks from today, the petitioner to file a Suit within a period of four weeks thereafter. The Bank Guarantee shall then stand transferred to the credit of the said Suit and shall be kept alive for a period of Sixteen Weeks from today. It would be then open for the Petitioner to apply for either renewing it or substituting it by some other security or insist upon payment, such Application to be considered by the Court trying the Suit on its own merits and in accordance with law.

(B) All contentions and pleas with regard to claims and counter claims of both sides are expressly kept open.

(C) Needless to state that on default in furnishing the Guarantee as directed above this Company Petition shall stand admitted and thereafter to be advertised in "Daily free Press Journal" and "Navshakti" upon payment of the advertisement charges.

[S.C.DHARMADHIKARI,J]